Supreme Court, U. S.
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No. 80-90

In the Supreme Court of the United States

October Term, 1980

NATIONAL WOOD PRESERVERS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD,
Intervenor

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

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Appellee and Intervenor move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania without further argument on the ground that this appeal presents no substantial federal questions.

COUNTER-STATEMENT OF QUESTION INVOLVED

Is it an unconstitutional exercise of the police power for a State to enact legislation which requires a business enterprise to undertake feasible water pollution control measures to abate a toxic water pollution condition which originates on its premises and which was caused by the enterprise itself?

COUNTER-STATEMENT OF THE CASE

The Pollution Condition

This appeal involves a water pollution condition on the premises of National Wood Preservers, Inc. ("National Wood") located in Haverford Township, Delaware County, Pennsylvania.

National Wood caused the pollution condition by dumping industrial wastes from its wood preservative business into the groundwater via a well. Adjudication of the Environmental Hearing Board ("EHB"), Joint Appendix to Jurisdictional Statement ("A")-53. Specifically, National Wood dumped pentachlorophenol ("PCP") and fuel oil into the well. EHB, A-53, A-60; Opinion of Commonwealth Court ("Commonwealth Ct."), A-29-A-39, A-41; Opinion of the Pennsylvania Supreme Court ("Pa. Supreme Ct."), A-3-A-4. PCP is an acidic, highly toxic chemical which is used in the wood preservative business to treat wood. EHB, A-53, A-71; Commonwealth Ct., A-29-A-30; Pa. Supreme Ct., A-3.

The PCP and fuel oil mixture dumped into the groundwater by National Wood contaminates the groundwater under National Wood's premises. EHB, A-70, A-81-A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. Such contamination constitutes pollution within the meaning of the Clean Streams Law. EHB, A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. The PCP and fuel oil mixture pooled under National Wood's premises flows under the surface of the land into an underground storm sewer pipe which discharges the contaminant

into a surface stream—Naylor's Run. EHB, A-70; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4.

The Proceeding Below

On July 12, 1973, the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") issued an administrative order under section 316 of the Clean Streams Law, 35 Pa. Stat. Anno. §691.316, to National Wood requiring it to take action to correct the pollution condition on its premises. EHB, A-48.

National Wood filed a timely appeal from DER's order to the EHB—an administrative adjudicatory body independent of DER.[1] EHB, A-48; Section 1921-A of the Administrative Code of 1929, 71 Pa. Stat. Anno. §510-21. On January 31, 1974, the EHB granted the petition to intervene filed by the Township of Haverford, the municipality in which the pollution condition exists. EHB, A-52.

On July 30, 1976, after hearing, the EHB affirmed DER's order against National Wood without dissent.[2] EHB, A-48-A-90.

On May 24, 1978, the Commonwealth Court, after appeal by National Wood, affirmed the order against National Wood without dissent. Commonwealth Ct., A-25-A-47.

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[1] When used in the context of a citation to the Joint Appendix, "EHB" refers to the Adjudication of the Environmental Hearing Board; otherwise it refers to the Environmental Hearing Board itself.

[2] The EHB modified DER's order in a few respects, but DER did not appeal from, nor object to, those modifications. When used henceforth in this Motion, "Order" shall refer to the DER order as modified by the EHB.

On April 24, 1980, the Pennsylvania Supreme Court, after appeal by National Wood, affirmed the order against National Wood without dissent.[3] Pa. Supreme Ct., A-1-A-24.

This appeal is from the order of the Pennsylvania Supreme Court.

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[3] Justice Flaherty filed a concurring opinion.

ARGUMENT

This Appeal Presents No Substantial Federal Questions

This is a case wherein DER has issued an administrative order to a business enterprise requiring it to use conventional water pollution control methods to abate a pollution condition which exists on its business premises and which it created in the first place. The EHB, the Commonwealth Court and the Pennsylvania Supreme Court all upheld DER's order without dissent.[4] This case involves nothing more than liability for public nuisance abatement under principles of Pennsylvania law and presents no substantial Federal questions.

The order which is the subject of this appeal was issued under the Clean Streams Law. The Clean Streams Law is the basic water pollution control statute in Pennsylvania. Section 316 of the Clean Streams Law is an integral part of the comprehensive water pollution control requirements of that statute and authorizes DER to issue administrative orders to landowners and occupiers to correct pollution conditions on their land.[5] Contrary to National Wood's misrepresentations in its Jurisdictional Statement (see Jurisdictional Statement at 26), Section 316 only authorizes the mildest form of civil remedy in the Clean Streams Law—an administrative order—and has nothing to do with criminal remedies. Indeed, Section 316 merely embodies the principle of Pennsylvania law that an owner or possessor of land is liable for a nuisance condi-

[4] See footnote 3, *supra*.

[5] Section 316 is quoted in relevant part at A-2.

tion on his own property. See *Fitzpatrick v. Penfield,* 267 Pa. 564, 109 A. 653 (1920); *Barker v. Brown,* 236 Pa. Superior Ct. 75, 340 A.2d 566 (1975); *Boyer v. Arianna,* 94 Pitts. L.J. 21 (1945).

In sharp contract to National Wood's wildly exaggerated and spurious arguments, this case illustrates the reasonableness of Pennsylvania's regulatory scheme under any test.

First, there is no question in this case that a serious pollution problem exists. The pollution condition consists of a mixture of PCP and fuel oil which contaminates the groundwater under National Wood's premises. EHB, A-70, A-82; Commonwealth Ct., A-28; Pa. Supreme Ct., A-4. PCP is an acidic, highly toxic chemical which is used in the wood preservative business to treat wood. EHB, A-53, A-71; Commonwealth Ct., A-29-A-30; Pa. Supreme Ct., A-3. Groundwater contamination constitutes pollution within the meaning of the Clean Streams Law. EHB, A-82; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4. The PCP and fuel oil mixture pooled under National Wood's premises also pollutes the surface water by flowing under the surface of the land and intercepting an underground storm sewer pipe which discharges it into Naylor's Run. EHB, A-70; Commonwealth Ct., A-28-A-29; Pa. Supreme Ct., A-4.

Moreover, National Wood has always been intimately associated with the creation and maintenance of the pollution condition. National Wood has at all relevant times possessed the property under leasehold and conducted its wood preservative business on it. EHB, A-52-A-53; Commonwealth Ct., A-27; Pa. Supreme Ct., A-3. In fact, in the course of its operation, National Wood itself caused the pollution problem by dumping PCP and fuel oil into

the groundwater via a well.[6] EHB, A-53, A-60; Commonwealth Ct., A-29-A-30, A-41; Pa. Supreme Ct., A-3.

National Wood's attempt to argue in its Jurisdictional Statement—relying primarily on unsupported allegations—that the order is unlimited is contrary to the record and without merit. The method of abatement required by the order—using wells to test for and pump the polluting product from the top of the groundwater—is commonly accepted and widely used. The EHB specifically found that the requirements of the order are feasible. EHB, A-86; see Pa. Supreme Ct., A-4.[7] In addition, the water pollution control methods which the order requires National Wood

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[6] In its Jurisdictional Statement, National Wood attempts to argue that its present management is not associated with the nuisance condition. This argument is both irrelevant and false. In the first place, as stated above, National Wood continues to possess and utilize the property for its wood preservative business. In any event, the order was directed at National Wood Preservers, Inc., not at individuals. Even assuming *arguendo* that the association of National Wood's present management with the nuisance condition is relevant, the findings below are conclusive that the present management not only took over National Wood with knowledge of the pollution condition but also engaged in "affirmative conduct which indicates an adoption of the condition". Commonwealth Ct., A-42. The present management even went so far as to explicitly release the prior management from a warranty that no liability for pollution existed. Commonwealth Ct., A-41-A-42.

[7] This finding dispositively contradicts National Wood's unsupported allegations in its Jurisdictional Statement that the order is unlimited. In order to clear the record, however, we will set forth several additional points regarding the economic cost portion of National Wood's feasibility argument.

In the first place, National Wood is precluded from making these arguments here because it did not raise them below. The

(Footnote continued on following page.)

to undertake are specifically limited to actions on its own business premises.[8] EHB, A-83. Furthermore, to resolve any disputes which may arise with regard to the order, the EHB—an adjudicatory body independent of DER—has retained jurisdiction in the case. EHB, A-90.

(Footnote continued from preceding page.)
Pennsylvania Supreme Court specifically found that National Wood did not argue that the requirements in question were "unduly oppressive" because of economic impact or interference with the use of their property. Pa. Supreme Ct., A-16.

Even if no dispositive findings regarding feasibility and failure to raise issues had been made below, National Wood's economic cost arguments consist of unsupported and misleading allegations. One example of this type of representation—unaccompanied by any attempt at record citation—is National Wood's allegation at page 9 of its Jurisdictional Statement that it already has expended some funds to abate the pollution problem. To the contrary, any such effort was related to a criminal case involving pollution caused by National Wood and is not involved in this case. Further, National Wood refers to an alleged expenditure by the Federal government on the pollution problem—also unaccompanied by any attempt at record citation. In fact, that expenditure was for several different kinds of pollution abatement work including stream filtration, trench construction and other recovery activities on several different properties, is outside the scope of the order in this case and does not accurately reflect the cost of abatement in this case.

[8] The fact that the order only requires National Wood to abate the pollution problem on its own premises disposes of National Wood's equal protection argument. As a point of information concerning National Wood's equal protection argument, we note that the Pennsylvania Supreme Court in its consolidated opinion below dismissed several abatement orders against other parties not involved in this appeal on technical grounds relating to the time for filing Petitions and Cross Petitions for Allowance of Appeal under the Pennsylvania Rules of Appellate Procedure. None of these dismissed orders required pollution abatement on National Wood's premises and they are not relevant here.

CONCLUSION

For the foregoing reasons, Appellee and Intervenor move that this appeal be dismissed or, in the alternative, that the opinion of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted

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